United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1041

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT
(CASE NO. 75-1041)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ALFRED LEAMOUS,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Whether there was sufficient evidence to support the verdict as to appellant?

2. a) Whether the jury's verdict of appellant's guilt to conspiracy and acquittal on the substantive crime demonstrated that the jury was confused as to the evidence or the charge?
   b) Whether under the Government's theory of the case an acquittal on the substantive count mandated an acquittal on the conspiracy?

3. Whether the prosecutor's remarks to the jury in both his opening statement and summation were so unfair to defendant that his conviction should be reversed.

4. Was the Judge's charges on reasonable doubt sufficient and, if not, was it plain error.

STATEMENT

This is an appeal by the defendant, Alfred Leamous, from a final judgment following a jury verdict entered by the United States District Court for the Southern District of New York, (Hon. Lloyd F. MacMahon, D.J.) on July 19, 1974, convicting the defendant of the crime of conspiracy to unlawfully, intentionally and knowingly distribute and possess with intent to distribute Schedule 1 and 11 narcotic drug(s) in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code. The defendant was acquitted of the second count of the indictment which charged the substantive crime of unlawfully, intentionally and knowingly distribute and possess with intent to distribute a Schedule 11 narcotic drug controlled substance, 67 grams of cocaine hydrochloride, in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

The defendant, Alfred Leamous, was sentenced to ten years imprisonment and three years parole. He is incarcerated pending the determination of this appeal.

FACTS OF THE CASE

THE INDICTMENT

A. The indictment in this proceeding named three other defendants in addition to appellant. They were Beau Ray Fleming, James Brown and Lucille Tezzano.

Fleming was tried with appellant;

Brown plead guilty on the eve of trial to Count #1 of the indictment (conspiracy) and testified for the Government; and

Tezzano became a fugitive on the day the trial commenced (2) (fn. 1)

B. The indictment charges each defendant with two counts. The first count charges a conspiracy to violate the federal narcotics laws in violation of §812, 841 (a)(1) and 841(b)(1)(A) of Title 21, United States Code. The second count charges the substantive crime of distributing and possessing with intent to distribute a narcotic drug, to wit, cocaine (67 grams), in violation of §812, 841 (a)(1) and 841(b)(1)(A).

C. The Overt Acts in support of the conspiracy count are:

1. On or about October 11, 1973, the defendant Lucille Tezzano had a phone conversation with an undercover agent of the Drug Enforcement Administration.

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fn. 1 The number in the parenthesis corresponds with the page number of the "Stenographer's minutes."

2. On or about October 12, 1973, the defendant, James Brown, and defendant, Lucille Tezzano, entered premises 125 West 96th Street, New York, New York.

3. On or about October 12, 1973, the defendant Alfred Leamous met with the defendant Beau Ray Fleming, at 125 West 96th Street, New York, New York.

THE GOVERNMENT'S OPENING STATEMENT

It is important to note at the outset that the Government's opening statement to the jury was factually inaccurate in its only references to appellant. That the statements were of such an important nature to the case against appellant that the Government must have known that the allegations could not be substantiated; that the statements were made recklessly in order to bring before the jury facts establishing appellant's participation in a conspiracy when the Government knew there was no proof to support the facts; and that the statements were made knowing that appellant would be prejudiced thereby.

Thus, the Government in its opening statement to the jury stated:

> 1. "Mr. Brown thereupon visited Miss Tezzano and used that same telephone and called one of the defendants, Mr. Beau Ray Fleming, the man on my left here, and he and Mr. Fleming, the Government's testimony will show, agreed that

they would acquire the cocaine from the fourth defendant, Mr. Leamous on the far right."(10) (fn. 2)

and

2."Mr. Brown has consented to testify in this case and give his testimony, and he will be another one of the witnesses that you will hear testifying to the conversations." (10)

"He will testify that along with Mr. Fleming and Miss Tezzano they visited Mr. Leamous's apartment and that at that time Mr. Leamous gave to Miss Tezzano the cocaine in question for $3,300." (fn. 3)

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fn. 2 The telephone at Tezzano's apartment was being monitored by Government agents and recordings were made of all telephone conversations. The telephone conversations between Brown and Fleming never mentioned appellant, by name or otherwise, and neither Brown, Fleming, or any other Government witness testified that Brown and Fleming "agreed that they would acquire the cocaine from the fourth defendant, Mr. Leamous on the far right.'

fn. 3 Brown did not testify that appellant gave Tezzano the cocaine for $3,300, and the Government knew that he would not and could not testify to this fact. On direct examination the Government asked Brown, "Q. Where did she get it from; did you observe? A. I don't know where she got it from. I didn't see it at any time....."(132). The Government's question refers to the cocaine. The Government did not ask Brown if he saw Tezzano give Leamous $3,300; but on cross-examination Brown was asked the following questions:

"Q. In any event, Mr. Brown, at the apartment at 125 West 96th Street, when you were there, you didn't see the defendant, Alfred Leamous, pass anything, did you, Sir?
"A. No, I did not.
"Q. You didn't see any money given to him, did you?
"A. No, I did not.
"Q. You hadn't ever met Mr. Leamous before, had you?
"A. No, I had never met him before.
"Q. How long were you in the apartment?
"A. Maybe 15, 20 minutes.
"Q. Was there any discussion with respect to drugs?
"A. I didn't hear any discussion.
"Q. None whatever?
"A. None whatever. (137)

THE GOVERNMENT'S CASE

Special Agent Adam Mangino testified that he contacted Lucille Tezzano on October 3, 1973, and discussed purchasing cocaine in the near future (16).

Tezzano lived in apartment 2B at 442 East 75th Street, New York City. The telephone in Tezzano's apartment was monitored and her telephone conversations were recorded. At 3:30 P.M. on October 11, 1973, Agent Mangino telephoned Tezzano to arrange the purchase of one-eighth kilogram of cocaine for $3,300. (17, 18, 20).

At 5 P.M. that day Agent Mangino telephoned Tezzano again. Tezzano told him to come to her apartment alone at 6 30, to park his car near her house and that she would put the cocaine in his car. (19).

Agent Mangino did not get to Tezzano's apartment until 8 P.M., although he telephoned her earlier to let her know that he was in New York City. Tezzano told Agent Mangino to remain in her apartment while she went out to get the cocaine, but to give her the money (20). The Agent said the money was in his car. They went to the car, drove around the block and then to Gleason's Bar on 75th Street and York Avenue. At Gleason's Mangino gave Tezzano 33 - $100. bills, the serial number of which had been recorded (21, 22). Mangino said he would wait at Gleason's for Tezzano to get the cocaine.

Tezzano telephoned Mangino four times at Gleason's.-- 9:15 P.M., 9:45 P.M. and 12:30 A,M. (October 12th), telling him that everything was going fine and he would have the cocaine sometime within the next few minutes (22).

At about 1:15 A.M. (October 12th) Tezzano telephoned and told Mangino she had the cocaine and to meet her at Rust Brown's night club on West 96th Street between Amsterdam and Columbus Avenue (23).

Agent Mangino arrived at Rust Brown's at about 1:45 A.M., and saw Tezzano and James Brown seated at a table to the rear of the bar. Tezzano introduced Brown and told Agent Mangino that Brown would give him the cocaine in the bathroom (23).

Brown and Mangino went to the bathroom and Brown directed the agent to the cocaine which was hidden in a toilet stall. Agent Mangino could not find the cocaine. He went back to get Brown from the table. This time Brown stood up on a urinal and reached up on the divider and pointed to where the cocaine was hidden. Mangino took possession of the cocaine at 2:05 A.M. (24).

The cocaine was field tested and found to weigh 57 grams containing 16% cocaine hydrochloride (27).

The next Government witness was Special Agent Laurence P. McElynn.

Agent McElynn went to 18 West 56th Street at about 8:30 P.M. on October 11, 1973 (30). He saw James Brown, who he did not know at the time, enter the building. About 10 minutes later Lucille Tezzano, who agent McElynn did know, pulled up in a taxicab and entered the same building. Agent McElynn saw Brown and Tezzano at a window of a loft on the 2nd floor(31)

At 9:30 P.M. Agent McElynn observed Beau Ray Fleming and a woman leave the building. The agent did not know Fleming, and, therefore he did not get out of the vehicle from which he was watching the building. Another agent, however, did get out apparantly to follow Fleming and the female (33,34) (fn. 4)

Around 9:40 P.M., Tezzano and Brown left the building and walked west on the south side of 56th Street. Agent McElynn testified that,

> "....I again didn't follow either of them." (33) (fn. 5)

Agent McElynn then left West 56th Street and went to the vicinity of Tezzano's apartment where he stayed for 45 minutes (fn. 6).

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fn. 4 Special Agent John P. Raftery testified that 9:30 P.M. Fleming and a woman exited 18 West 56th Street and entered a taxicab going north on Sixth Avenue. They were not followed at this time (75).

fn. 5 McElynn's statement is inaccurate. The agents lost Tezzano and Brown while they were walking West on 56th Street and did not see them again until about 10:15 P.M. At that time they were having dinner at Benihana's Restaurant on 56th Street between Fifth and Sixth Avenues (75,76).

fn. 6 Apparantly the agent was trying to pick up Tezzano's trail after they lost her coming out of 18 West 56th Street, and he went to her apartment house to see if she would return there.

Tezzano and Brown did not show up at Tezzano's apartment house, and McElynn went back to West 56th STreet in time to see Tezzano, Brown and another girl come out of Benihana's and get into a taxicab (34).

The agent followed the taxicab tc Rust Brown's which is on West 96th Street and Columbus Avenue and saw Tezzano, Brown and the girl go into the restaurant (34). Shortly afterwards Brown, Tezzano and Fleming came out of Rust Brown's and walked across the street to an apartment house at 125 West 96th Street. The agent fixed the time that they left Rust Brown's at about 12:15 A.M. (October 12th) (35)

At about 1 A.M., Tezzano and Brown came out of the building at 12 W. 96th Street, and went back to Rust Browns. About 30 to 45 minutes later Agent Mangino appeared and went into Rust Brown's. He was in the restaurant about 30 minutes then left in his car. Tezzano and Brown came out 10 minutes later and got into a taxicab. They were followed and arrested on Central Park South (35).

Agent McElynn went back to 18 West 56th Street at 5 P.M. (October 12th) and when Fleming arrived one-half hour later he was arrested (36-7). One of the $100. bills that was given to Tezzano by Agent Mangino to purchase the cocaine was found on Fleming at the time of his arrest.

The Government's next witness was Agent John P. Raftery. Agent Raftery's testimony was similar in most respects to Agent McElynn's testimony. However, Agent Raftery explained

that Tezzano and Brown were lost by the agents when they exited 18 West 56th Street at 9:40 P.M., and were not seen again until 10:15 P.M. at Benihana's Restaurant on West 56th Street. (75,76). Agent Raftery entered Benihana's and observed Tezzano and Brown seated at a table with a black woman who he had followed from Fleming's loft at 18 West 56th Street (77).

Agent Raftery was present when Tezzano and Brown were arrested and taken to the agent's headquarters at West 57th Street. That Tezzano and Brown were searched and found to have several of the $100. bills that were used to buy the cocaine. Brown had three of them and Tezzano had six. (78, 79).

Agent Raftery was present when Fleming was arrested and searched. In addition to finding one of the $100. bills on Fleming, he found three slips of paper with the name "Al" and a telephone number 850-8537. (80,83).

Agent Raftery testified regarding the telephone number, as follows:

> "Q. Agent Raftery, you said that there was a check made with the telephone number appearing on three of those slips, is that correct?
> "A. Yes, sir, I did.
>
> "Q. To whom was that telephone number registered? To what address?
> "A. It was registered to the address 125 West 96th Street, Apartment 4C.
>
> "Mr. Weiss: I move the answer be stricken as not responsive. A number is assigned to a party, not to an apartment address.

"The Court: Over ruled. (83) (fn. 7)

On October 15th, 1973, at 7 A.M., agent Raftery went to 125 West 96th Street, Aparıment 4C to effect a searc warrant. Appellant answered the door bell and was placed under arrest, subject to a search warrant by Special Agent Weidl. Appellant denied that the apartment was his and claimed that he was only "utilizing" the apartment (84).

The search disclosed 2 one pound containers of lactose which were found in a cabinet in the kitchen (85) (fn. 8)

The Government called James Brown as a witness.

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fn. 7 Previously, Government's Exhibit 7 for identification-- 3 slips of paper found on Fleming at the time of his arrest with the name "Al" and the telephone number 850-8537 were offered by the Government into evidence. Mr. Weiss objected to the offer on the grounds of "revelency." The trial judge received Exhibit 7 subject to connection.

fn. 8 In a pre-trial motion to suppress and discover all evidence seized at 125 West 96th Street, Apartment 4C, which the Government intends to offer into evidence at the trial, the Government submitted an affidavit stating that none of the evidence taken from apartment 4C would be offered in evidence at the trial. However, the Government offered Exhibit 5 for Identification into evidence - the 2 one pound cans of lactose - over appellant's objection (upon different grounds), which the trial court received. The Government used Exhibit 5 very effectively against appellant in opposing the motion for a directed verdict after the Government rested (169) and in the summation (258).

Brown testified that Tezzano telephoned him on October 11th, 1973, and told him that she had a buyer that would pay $2,000. or $3,000. for an eighth of a "key" of cocaine, and that she didn't know anyone that had any. Brown told her that he didn't know anyone that had cocaine, but he would call to see if anyone had any (112).

Brown then telephoned a few of his friends one of whom was Fleming. He told Fleming that he was coming to the City and was going to come by his office (113, 114) (fn. 9).

Brown arrived at Tezzano's apartment at approximately 6 P.M. They discussed the money that Tezzano was going to get for the cocaine, and also, Brown telephoned Fleming twice. During the conversations Brown told Fleming he was going to bring a friend with him that Fleming knew (116)

Fleming also telephoned Brown at Tezzano's apartment that same evening. He told Brown that he could come to his office and bring his friend (117).

After the last telephone call Brown told Tezzano that he was going to Fleming's office. He took a taxicab to West 56th Street and went to Fleming's office. About 15 minutes later Tezzano arrived and both Brown and Tezzano stood by a

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fn. 9 Just prior to Brown testifying about the substance of the telephone call with Fleming, the Government's attorney asked him, "Q. Do you see Miss Tezzano in the courtroom? "A. Yes, I do." (113)
Brown pointed out the defendant, Beau Ray Fleming.

window talking (121) (fn. 10). Fleming finished his meeting and came out. Fleming and Tezzano went into Fleming's office for about five or ten minutes. When Tezzano came out she and Brown wanted to go to eat. Brown told her he didn't have any money. Tezzano said she would pay for the meal. "That's the time she told me that she had quite a bit of money on her".(122).

Brown and Tezzano went to Benihana's which is acrossthe street from Fleming's office. During dinner Fleming's secretary came in and invited them to meet Fleming for a drink at Rust Brown's. Tezzano paid the dinner check and the three of them took a taxicab to Rust Brown's. They took a table and "had a few drinks." While they were sitting there Fleming came in and joined them. Brown did not hear what Tezzano and Fleming were talking about because he was sitting across the table from them speaking to the secretary. Shortly, Brown

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fn. 10 The Government's evidence on this point appears inconsistant, but the defendant's trial counsel did not challenge Brown's testimony. Mangino previously testified that he arrived at Tezzano's apartment at 8 P.M. Brown had already left. He had a conversation with Tezzano and they left separately meeting at Mangino's car. They drove around the block, parked and went into Gleason's Bar. Mangino gave Tezzano the $3,300, and had a conversation about where Mangino would wait for Tezzano finally agreeing that Mangino would wait at Gleason's. Tezzano left Gleason's (75th Street and York Avenue) and went to 18 West 56th Street. Agent McElynn testified that she arrived at W. 56th St. only 15 minutes after Brown. The Government's attorney asked Brown, "Q. After you had called Mr. Fleming, and while you were at Miss Tezzano's house, on the evening of October 11th, approximately 6:30, did Fleming call you at that number? "A. Yes, he did." (117)
A rebuttle witness was called by the Government. Agent Alexander Fraser Smith, Jr. testified that he was the agent monitoring Tezzano's phone and that at 7:03 P.M. Fleming telephoned and spoke with Brown.

was told that they were going someplace with Fleming. Before leaving Rust Brown's Tezzano spoke to some friends of hers and Fleming, Tezzano and Brown went to 125 West 96th Street. (123, 125)

When they entered the building Fleming rang a bell and a buzzer unlocked the downstairs door. They went to the fourth floor, apartment 4C (125, 126) (fn. 11).

Fleming knocked on the door and they were invited inside (126) (fn. 12)

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fn. 11 On the night Brown was arrested, October 12th, 1973, he advised the Agents that questioned him that he went to an apartment on the fifth floor at 125 W. 96th Street. He apparantly changed his testimony with the help of the Government. When being questioned about the inconsistancy he blurted out this unresponsive answer, "A. When I was told that it was not the fifth floor, but the fourth floor." (157)

fn. 12 Although Brown testified that Fleming "knocked" on the door (Brown remembered Fleming rang the downstairs bell) Agent Raftery previously testified that on October 15th, when he went to effect the search warrant at Apartment 4C, 125 West 96th Street, he 'rang the bell to Apartment 4C' and appellant 'answered the doorbell at Apartment 4C.' (84)

They were introduced to everyone in the apartment and Brown specifically remembered being introduced to appellant (126).

They sat down and were offered a glass of wine. Appellant came over and said he wanted to speak with Brown, but Tezzano interrupted and said, "No, you want to speak to me" (127) (fn. 13).

Tezzano and appellant went into the bathroom for ten minutes. Brown could not see the bathroom and did not know whether the door was closed (127).

Brown and Fleming were in the living room with some other guests in the apartment. All that was spoken about was music and a book that appellant had written and Fleming was attempting to get published.

Brown testified that when Tezzano and appellant came back into the room everyone had another glass of wine and Tezzano

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fn. 13 The Government's attorney was able to convince the trial judge not to direct a verdict of aquittal of appellant because of Tezzano's interruption of appellant's intended conversation with Brown with the words "No you want to speak to me," arguing that the words indicated some sort of prior arrangement, and that the prior arrangement was made through Fleming by virtue of the slips of paper with the name "Al" and the telephone number (165, 166).

came over to Brown and gave him some money which he had asked her for (128) (fn. 14).

Brown and Tezzano remained in the apartment another five minutes. The trial judge questioned Brown about what appellant spoke about in the living room.

"The Court: Did Mr. Leamous say anything while you were sitting there?

"The Witness: No. We talked about music other than he was recording and we talked about a book, That's about it.

"The Court: Where was he when the money was handed to you?

"The Witness: I think everyone was in the living room when she handed the money.

"The Court: Where was he in relation to you when she handed the money?

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fn. 14 The Government's attorney misquoted Brown's testimony on this point in his argument in opposition to the motion for a directed verdict of acquittal of appellant. The Government's attorney stated that, ".....and Brown testifies that as soon as Tezzano comes out (referring to the bathroom), she slips him $300 in front of everybody" (167) and, in the next paragraph he stated, "She come out, immediately gives him the money. Shortly thereafter they leave, and it is again Fleming that stays in the apartment, indicating his relationship with Leamous" (167). Brown's actual testimony was,

"A. We had another glass of wine. Toni came over to me and----

"Q. When you say "toni" who do you mean?

"A. Miss Tezzano came over to me and gave me some money which I had asked her for. Then we-----"(128)

"The Witness: As I recall, Your Honor, he was standing over by the record player or either by the table. I don't clearly remember that.

"The Court: Where were you at the table?

"The Witness: I was sitting at the table, having a glass of wine." (129, 130).

Brown and Tezzano left the apartment together and went to Rust Brown's. When they arrived at the bar Tezzano said she was going to call a friend and that Brown was to give him a package. Brown refused (130). Five minutes later Tezzano passed a package to Brown under the table. Brown did not know where or when Tezzano had gotten the package. He testified that he did not see Tezzano get the package at the apartment at 125 West 96th Street nor did he see any money given to appellant in the apartment. Nor did Brown testify that he saw Tezzano carry a package away from the apartment at West 96th Street. (132, 137).

Tezzano went to make a telephone call and when she came back to the table Brown had hidden the package in the bathroom (130).

The money given to Brown by Tezzano was 3 of the marked $100. bills and was recovered by the agents when he was arrested that night (134).

The Government recovered 10 of the 33 $100. bills. Brown had 3, Tezzano had 6 and Fleming had 1.

At the time of appellant's arrest he and the apartment at West 96th Street were searched. None of the marked $100. bills were found on appellant or in the apartment, nor was any cocaine or drugs found therein. The only things found were the 2 one pound cans of lactose.

After Brown left the witness stand the Government rested its case (160).

Appellant's attorney made a motion to dismiss the indictment.

The trial judge advised the Government to show cause by the next day how they hold appellant in the case. The following comment was made:

> "The Court: My own recollection of the evidence is that it is pretty scarce and I just want to make sure, and the Government has got to make it out, what you have got on Leamous. It is very thin." (160).

After denying the motion for acquittal made on behalf of Fleming, the trial judge further commented regarding appellant.

> "The Court: I will reserve decision on Mr. Brill's motion with respect to Leamous, pending argument by the Government tomorrow morning promptly at 11:30.
>
> "I don't want it to be extensive. I just want you to catalog what your evidence is, bearing in mind that mere association is not enough." (161)

The following day:

"The Court: All right, let's hear the argument. I want the Government to show me how you get Mr. Leamous in this case.

THE GOVERNMENT'S CASE:

"Take the presumption that we have here a conspiracy between the first three defendants, which are Fleming, Brown and Miss Tezzano, and that they are at Rust Brown's, at Mr. Fleming's suggestion. He, in fact, sent his secretary to tell him that he would meet them up there in order for them to have a drink.

And there is little doubt, it would appear, that Mr. Fleming is in fact Brown's connection. Tezzano had told him on the telephone call previously to find a source.

He says, "Yes, I will find you a source," and immediately thereafter he calls up Fleming.

Now they are at Rust Brown's and they are talking, and the evidence indicates that there is no long-standing friendship between Tezzano and Fleming, while they are in Rust Brown's they go across the street to 125 West 96th Street, and it is Fleming who rings the bell, he knows where he is going, and it is Fleming who knocks on the door, and it is Brown and Tezzano who are introduced to Leamous. They don't know him. They have never seen him before.

And it is evident that it is Fleming that knows Leamous.

Now Leamous comes over and he tells Brown, "I'd like to speak to you," and Tezzano says, "Oh, no, you don't; you want to speak to me," indicating some sort of prior arrangement.

And I submit, your Honor, that the evidence shows that this prior arrangement was made through Fleming since he is the one by virtue of the three telephone slips found on his person that knows Leamous.

THE COURT: How have you tied those slips into Leamous?

Mr. FIGUEROA: It has his name Al, his first name. It has his telephone number.

THE COURT: How have you shown that that is his telephone number?

MR. FIGUEROA: There was evidence from the agent that they called up and the telephone number came back, Apt. 4C, 125 West 96th Street, and there are three of them.

THE COURT: How do you tie Apartment 4C, at that address, to Leamous?

MR. FIGUEROA: The fact that he is there on the morning of October 12th, and the fact that he is there on October 15th, a few days later, and then he says to the agents, when they come in with the search warrant, he says, "This isn't my apartment. I'm only using it."

THE COURT: All right, go on.

MR. FIGUEROA: So, Tezzano and Leamous get up and Brown testifies, and I think you could at least take his word for this, that they go into the bathroom, which is an unusual place for visitors to go into on first impression, and

Brown testifies they are in there ten minutes, and they come out, and Brown testifies that as soon as Tezzano comes out, she slips him $300 in front of everybody, and the testimony in the record indicates that during this time Fleming stayed in the living room with Brown, so that it was Leamous and Tezzano who were together up there in that apartment, in the bathroom.

She come out, immediately gives him the money. Shortly thereafter they leave, and it is again Fleming who stays in the apartment, indicating his relationship with Leamous.

They go across the street to Rust Brown's. They sit down. Shortly thereafter Tezzano slips the package over to Brown and she says, "I'm going to call up Adam and tell him to come over here."

Now, this is interesting because the telephone conversations indicate that Tezzano is dead broke, that she is really desperate for money. The record indicates she called Adam about three times that morning, at 9:15, 9:45, 12:30 a.m. All of a sudden, when they leave 125 W. 96th Street, she calls him at 1:15 a.m. and she tells him,"I got the stuff, come on over."

This indicates inferentially, at least, that she had just gotten it and, I submit, your Honor, that if we trace her path that night, that there was no other person from whom she could have gotten that stuff other than Mr. Leamous, because definitely she did not get it from Fleming. There was no other opportunity for anybody else to give her that package except Mr. Leamous inside that bathroom.

THE COURT: This isn't the case of her going in the bathroom and buying narcotics. She comes out with three hundred dollars. She comes out with the money. How do you draw an inference from that, the fact that she comes out with $300, that she was the buyer of the narcotics rather than the seller of them?

MR. FIGUEROA: She comes out not only with the $300, but the $600 that was later found on her person, and later on, the next day---

THE COURT: How much later?

MR. FIGUEROA: That same night, at her arrest, at about shortly after--

THE COURT: She comes out with $900?

MR. FIGUEROA: $900. The next day Fleming--

THE COURT: What is your theory; this is her cut for making the buy?

MR. FIGUEROA: Exactly, your Honor, that this is her commission, and that they each, all of the defendants have a share in the $3,300. Fleming was found with $100 the next day, so we account for at least $1,000 that was paid off in commissions, and the major bulk, the Government would contend, was received by the defendant Leamous.

We have the lactose, the lactose in his apartment, which, I think, there is a sufficient nexus, and we take the lab report, which is in evidence, shows, as do the chemical analysis papers, that lactose was the dilutent used in the cocaine which was bought by Mangino.

THE COURT: Let me hear you.

MR. BRILL: Your Honor, what the Government is attempting to do is to draw an inference upon an inference. All of the testimony adduced by the Government doesn't involve or implicate the defendant Leamous one iota.

In connection with that, may I respectfully submit to your Honor, so far as the lactose is concerned, the agent conceded that it could be used for medical purposes.

THE COURT: Well, that is immaterial. That can be used for food, too, as well as narcotics, so that is immaterial.

MR. BRILL: I call your Honor's attention to the case of United States against Armone, membership in a conspiracy is not---

THE COURT: I am familiar with the law. Tell me what the facts are. Why do you say there is a hole in the Government's case, factually a hole?

MR. BRILL: Yes, your Honor, the recordings do not mention Leamous at all; the evidence adduced by the Government, so far as the witness is concerned, Brown is concerned, does not-- he was there for fifteen minutes-- does not involve Leamous at all. There is no testimony of any conversations had by Leamous with him.

In fact, there isn't a scintilla of evidence--

THE COURT: Oh, yes, there is.

I will deny your motion. I think prima facie the Government satisfies its burden of proof, at least of showing me that there are facts from which reasonable men could find beyond a reasonable doubt that Leamous did pass the narcotics to the girl while they were in the bathroom. I think there is evidence from which a jury could find that.

All right, we will proceed."

APPELLANT DID NOT PUT IN
A CASE

FLEMING'S CASE

Fleming testified that he was an agent for musicians and theatrical people. That he had a loft at 23rd Street and an office on the third floor of 18 W. 56th Street (171, 172).

That he knew appellant and was representing him as a literary agent to have a book appellant had written published (172).

Fleming testified that appellant was writing a second book and wanted to borrow a dictaphone to record ideas for this book (178). Fleming was going to bring the dictaphone machine to appellant at 6 P.M. However, Fleming got tied up with business people and was late for his appointment with appellant. That when the other people left he went out and said hello to Brown (180). Tezzano was there but Fleming did not know her. He denied having a private conversation in his office with Tezzano (180).

Fleming told Brown that he had to bring the dictaphone to appellant which would not take long and that he would be back (181).

Fleming and his secretary, Andrea Altman, went to appellant's apartment. They had difficulty getting the dictaphone to work. Fleming telephoned his office and told another secretary, Mrs. Fields, to have Brown meet him for a drink at Rust Brown's (182).

Fleming joined Brown and Tezzano at Rust Brown's. They stayed only a moment and Fleming invited them to appellant's apartment for a drink (183,184).

Fleming testified Brown gave him the marked $100. bill because he owed him money (184).

Fleming denied introducing Tezzano to appellant as a purchaser and buyer of narcotics (185).

Fleming stated that in addition to Tezzano, Brown, Miss Altman and appellant there were two other women in the apartment. He stated that appellant and Tezzano did not go into the bathroom for a private conversation, but that they all were in the living room the entire time (190,192).

Joan Fields testified for Fleming. Miss Fields testified that she was Flemings' secretary. That she recalled Tezzano and Brown coming to Flemings' office and that at no time did Tezzano and Fleming have a private conversation in Flemings' office (215,216).

Miss Fields also testified that Fleming was representing appellant and attempting to have his book published (228,229).

THE GOVERNMENT'S CLOSING ARGUMENT AS IT PERTAINS TO APPELLANT'S CONVICTION

> "Initially, we have Adam Mangino, and he testifies that he calls Tezzano, indeed, this telephone conversation is recorded, and there is no doubt but that there is a contract between them. He is going to buy drugs." (247,248)

"One very important thing to keep in mind. He[Mangino] gave Tezzano $3,300 on that occasion..... .....and she is going to try to get the staff (248).
"Now, picture Tezzano is broke. She is dead broke, and she needs money, and the only way she could get this money, hold onto this money, is by supplying Mangino with the drugs." (249)

"Very important also: Tezzano comes out [Fleming's office] and she sits down with Brown and she says,'Let's go eat,' and Brown says, 'Gee, I don't have any money,' and Tezzano now says, 'Well I've got a lot of money. Let's go out!
"Now what's the significance of this? 'I have a lot of money. Now let's go out'

"The significance is, and you can infer, that when she was in the office with Fleming, the contract was made, Fleming told her yes-----"interruption---
"You can infer they were in that office, they were discussing drugs, and Tezzano can not spend that money up to that time because she didn't know whether the drugs would be available, and that is why she says, 'Don't worry about it. I'm treating. I've got a lot of money'" (250)

"Well, here is Mr. Fleming, he says, 'Send them up to the bar! And he has already been to Leamous' apartment, so you can determine that he has had a conversation with Mr. Leamous about the drugs and the deal is on." (251, 252)

"Then Mr. Leamous comes and he comes over to Brown ---very important---'I want to speak to you.'
"and what did Brown say at this time? Brown testified that Tezzano gets up and she says, 'Oh, no, you don't want to speak to him; you want to speak to me'.

"What does this indicate? This indicates that she knew what she was up there for and this indicates that when Leamous came out, he knew what it was all about; he knew there was a contract for dope, and that is why he went to Brown." (252,253)

"And what happens then? They go into the bathroom. Brown testifies they close the door. They are in there five or ten minutes." (253) (fn. 15).

"As soon as they come out, Tezzano gives Mr. Fleming three one hundred dollar bills." (253) (fn. 16).

"Does that indicate to you that while she was in that bathroom she got the poison, the cocaine, and that it wasn't until she came out of that bathroom that she had it in her possession?"
"Now that is circumstantial evidence, but it is, I submit, sufficient to convict both defendants." (253).

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fn. 15 Brown's actual testimony, (127)
"Did they close the door?
"As I recall. I couldn't see the door because I was sitting at the dining room table."

fn. 16 Tezzano gave Brown the 3 one hundred dollar bills (128). Also, according to Brown when Tezzano came out of the bathroom she had some wine and then, "Miss Tezzano came over to me and gave me some money which I had asked her for" (128)

"This poison came from somewhere that night. She had it on her. It didn't just appear." (253)

"After they leave that apartment, they go back to Rust Brown's and they sit there, Tezzano and Brown, and at this time, as soon as they get there, they sit down, and it is then that she gives the cocaine to Brown, because she didn't have it prior to going up in that apartment." (255) (fn. 17)

"We know that she must have gotten it from somewhere, and I submit that the only person that she had opportunity to get it from was Mr. Leamous in Mr. Leamous's apartment, because we are dealing here with a girl who claims she is broke, broke, broke."(255)

"Do you think if she had gotten it before she went to Leamous's apartment that she ever would have been up there? Here is a girl with over $3,000 on her person. If she had that junk on her before, she would have scooted over or had Adam come over so she could surrender the junk to him?" (256)

"What happened to the rest of the money? She got the cocaine. She must have given it to someone[?] And who is that someone? Isn't it obvious that it was Leamous?" (257)

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fn. 17 Brown testified that they were at the table for five minutes before Tezzano passed him a package under the table (132) Brown did not know where she got the cocaine from. He did not see it at any time (132)

"Now, this is after five P.M. On the following day, and this is all they find on him and, of course, at that time they also find three slips of paper with Al Leamous' phone number and his name on it" (257)

"Now you are dealing with two large sized containers of lactose. Do you suppose this had any innocuous, any innocent purpose behind it?" (258)

"Of course, counsel has given me too much credit as far as saying Mr. Figueroa has to prove --Mr. Figueroa doesn't have to prove anything." (258)

THE JUDGE'S CHARGE AS IT PERTAINS TO APPELLANT'S CONVICTION

After the Government's closing argument appellant's trial attorney requested the trial judge, as follows:

"MR. BRILL: Your Honor, I would like Your Honor, in marshalling the evidence, to charge the jury that on cross-examination, Brown testified that he did not see any money passed from Miss Tezzano to Alfred Leamous, although he was there for minutes, he heard no conversation regarding drugs, saw nothing which would indicate the passage of drugs." (259)

THE COURT: I do not intend to marshall the evidence in this very brief case. That was your job in your summation, not mine, and in charging the jury, in an ordinary narcotics case, I don't intend to marshall the evidence, and I can't do that without marshalling all of it, and I certainly am not prepared at this point to marshall all of it. Your request comes, as it does, a minute before I am about to charge the jury, Mr. Brill, so it would be--I decline to do it. It would be just out of context with the whole story, and I haven't gotten the whole story, and I am not prepared to

do that." (259,260) (fn. 18)

Appellant's trial counsel repeated the request after the charge.

REASONABLE DOUBT

> "Now, what do I mean by beyond a reasonable doubt? As the phrase implies, a reasonable doubt is a doubt that is based upon reason, a reason which appears in the evidence or in the lack of evidence.
>
> It is not some vague, speculative, imaginary doubt, nor a doubt based upon emotion or sympathy or prejudice or upon what some juror might regard as an unpleasant duty.
>
> The Government is not required to prove a defendant guilty beyond every possible doubt, nor to an absolute or mathematical certainty, because such measure of proof is usually impossible in human affairs.
>
> You should review all of the evidence as you remember it, sift out what you believe, discuss it, analyze, weigh and compare your view of the evidence with that of your fellow jurors.

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fn. 18 Perhaps the trial judge is not technically required to marshall the evidence, and was not prepared to do so, however, it would seem that in view of the fact that appellant's attorney did not marshall the evidence and the Government's attorney misquoted Brown's testimony, ie. Brown did not testify that the bathroom door was closed, when Tezzano came out of the bathroom she was given a drink, sat down next to Brown before passing him money which he asked her for, etc., and the Government's case against Leamous was "very thin", "pretty scarce", based solely upon inferences drawn upon inferences and speculation, the request should have been granted. The Government's attorney was permitted to freely speculate upon the evidence without interruption by counsel or the trial court, and to insure against an improper verdict that might result from a misquote of the evidence the trial court should have granted the request of appellant's counsel.

> If that process produces a solemn belief or conviction in your mind, such as you would be willing to act upon without hesitation if this were an important matter of your own, then you have been convinced beyond a reasonable doubt.
>
> On the other hand, if your mind is wavering or so uncertain that you would hesitate before acting if this were an important matter of your own, then you have not been convinced beyond a reasonable doubt and you must render a verdict of not guilty. (270,271)

THE JURIES NOTE:

1. Clarification of the conspiracy count.
2. Clarification of the possession count.
3. Can either defendant be convicted of conspiracy and not of possession (301).

In regards to the first item of the juries note the trial court re-instructed the jury on the elements of a conspiracy count in giving the example of the overt act which the Government must prove in furtherance of the conspiracy the trial court only recited as an example the telephone conversation between Tezzano and agent Mangino on October 11, 1973 (302) (fn. 19)

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fn. 19 Tezzano could not conspire with Agent Mangino. The conspiracy necessarily had to start at the time Tezzano telephoned Brown and Brown agreed to find the cocaine. Overt Act # 1 should have been dismissed.

In regards to the second item of the note the trial court advised the jury:

> "Now, here the Government says that Leamous made a sale while they [Tezzano and Leamous] were in the bathroom there, and the Government asks you to infer that from circumstantial evidence. That is the distribution the Government relies on, and that is the possession the Government relies on." (305)

As to the third item of the note, the trial court stated:

> "Now as to the third question you raise: 'As far as this case is concerned, can either defendant be convicted of conspiracy and not of possession?' I would say no, not on the evidence in this case, not on the evidence in this case" (306)

> "I should say, legally, as a technical matter, you could, but it would be an inconsistant verdict on your part. The jurors have a right to be inconsistent if they want to." (306)

The case was given to the jury for its deliberation on March 11, 1974 at 12:45 A.M. and upon failing to reach a verdict at 9:30 P.M. the jury was sequestered for the night. Deliberation resumed on March 12, at 9:05 A.M. and a verdict reached after 2 P.M.

Appellant was convicted on the first count of the indictment, conspiracy, and acquitted on the substantive count.

Appellant was sentenced to 10 years imprisonment and 3 years probation

POINT 1

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT AS TO ALFRED LEAMOUS

The record of this case contains only tree items of evidence associating Alfred Leamous, the Appellant, in any way with the co-defendants, and in no way implicating him in criminal activities.....none of them is by direct evidence, nor even by hearsay testimony. In testing sufficiency to support a verdict, of course, only the direct evidence may be considered. United States v. Reina, 242 F. 2d 302 (2d Cir. 1957), cert. denied, 354 U.S. 852 (1957).

The only testimony to link appellant in any way with the co-defendants is the testimony of Brown. Brown testified that he, Tezzano, Fleming and Fleming's secretary were having a drink at a bar on West 96th Street. That Fleming, Tezzano and Brown went to apartment 4C, at 125 W. 96th Street (fn. 20). They were introduced to other people in the apartment and were offered a glass of wine.

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fn. 20 Although Brown testified on direct examination that they went to apartment 4C (125,126), the night that he was arrested he advised the agents that the apartment was on the fifth floor (Government report 3508). Brown only remembered the apartment was on the fourth floor when the Government told him it was not the fifth floor (156, 157).

Appellant came over to speak with Brown, and Tezzano said, "No, you want to speak with me." Tezzano and appellant went into the bathroom for maybe ten minutes. When they came out they had another drink and Tezzano gave Brown some money which he had asked her for. Brown and Tezzano remained in the apartment for another five minutes and then went back to the bar at West 96th Street (125, 128). When Fleming was arrested about 17 hours later he had three slips of paper with the name "Al" and a telephone number. When Agent Raftery was asked to whom the telephone number was registered and at what address, he replied, "It was registered to the address 125 W. 96th Street, Apartment 4C," He never replied to the first part of the question although he made a check (83,84). Lastly, apartment 4C, at 125 West 96th Street, was searched by Agent Raftery and other agents on October 15th, 1973 at 7 A.M. Appellant was in the apartment and told the agents that he was using the apartment. The agents found two 1 pound cans of lactose, a sugar supplement, in a kitchen cabinet (84,85,88). (fn. 21)

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fn. 21 A search warrant for apartment 4C, 125 W. 96th Street was obtained on October 13, 1973. The affidavit to support the search warrant was made by Agent James Greenan who was a member of the team of agents investigating Tezzano. The agent stated that he was informed by Raftery that a sale was made to an undercover agent on October 11, 1973 (The sale was made on October 12th, 1973), that one of the individuals arrested (Brown) advised that the cocaine was obtained from the occupant of apartment 4C (Government document states that Brown told the agents he was in an apartment on the 5th floor), and one of the defendants "disclosed that there were additional quantities of cocaine remaining in apartment 4C which were observed on top of a table at the time the cocaine was obtained from the occupant (Brown testified that he never saw any cocaine until after he and Tezzano went back to the bar on W.96th St.) No other cocaine or any of the marked $100. bills were found by the agents in apartment 4C or on the person of appellant during the search.

This evidence, taken in the light most favorable to the Government, shows no more than a possible participation (as likely as not in the capacity of seller of which appellant was acquitted) in one narcotics transaction --an isolated act that in itself shows no knowledge of the existence of the conspiracy or to assume a definite and continuing role in the conspiracy. This evidence is insufficient to sustain a guilty verdict. United States v. Reina (supra) and United States v. Stromberg, 268 F.2d 256 (2d Cir. 1959), cert denied, 361 U.S. 863 (1959).

Specific knowledge by appellant that he did unlawfully, intentionally and knowingly distribute and possess with intent to distribute a narcotic drug is an essential element of a conspiracy to commit a particular substantive offense. Conspiracy to commit a particular substantive offense cannot exist without at least some degree of criminal intent necessary for the substantive offense itself. Jefferson v. United States (C.A. Cal. 1965), 340 F. 2d 193, cert denied, 381 U.S. 928. To like effect is Palomono v. United States (C.A. Cal. 1963), 318 F. 2d 673.

Without knowledge, intent to participate in an established conspiracy may not be found. Dennis v. United States, (C.A.Colo.1962) 302 F 2d 5.

Knowledge of the existence of the goals of a conspiracy does not itself make one a co-conspirator; one must have a stake in the venture. United States v. Cianchetti, (C.A.Conn.1963), 315 F. 2d 584.

Proof of knowledge on the part of an alleged participant in a conspiracy is an essential element of the offense. United States v. Annoreno,(C.A. Ill. 1972), 460 F. 2d 1303.

Membership in a conspiracy is not inferable merely because of family relationships, because some defendants may have associated with each other, or because of friendship between alleged co-conspirators. United States v. Armone, 363 F.2d 385.

It would seem that in testing the sufficiency of the Government's burden of proof as to a particular defendant, the trial court must determine not merely whether there was evidence to show some participation by him in the conspiracy, but also whether there was sufficient evidence to establish the nature of defendant's participation. For the jury's determination as to whether this appellant participated in a conspiracy it must necessarily turn upon a determination of the nature of this appellant's role. According to the only theory advanced by the Government appellant's role consisted of the one isolated transaction of selling cocaine to Tezzano which she in turn sold to Mangino.

The Government's evidence upon which it argued substantiated appellant's participation in the conspiracy was, as the trial court commented earlier, "pretty scarce" and "very thin" (160), and it was upon this same evidence that the Government relied to show the nature of appellant's role (165, 170).

Thus, according to the Government's argument the evidence proved a conspiracy between Tezzano and Brown to sell cocaine to Mangino. Fleming was brought into the conspiracy by Brown because Brown apparantly knew Fleming sold cocaine (165). Tezzano met Fleming at Fleming's office and had a private conversation. This meeting was to arrange for Fleming to have appellant sell Tezzano cocaine. Later Fleming met Tezzano and Brown at a bar on West 96th Street after Fleming's secretary went to Benihana's restaurant on West 56th Street to tell them where Fleming would be.

From the West 96th Street bar Fleming took Tezzano and Brown to meet appellant and some other people in apartment 4C at 125 West 96th Street. Brown's testimony, according to the Government, was that when they entered the apartment introductions were made and they were given a glass of wine. Appellant then came over to Brown and started a conversation which Tezzano interrupted saying that she was the one with whom appellant wanted to speak.

From this incident the Government theorizes "some sort of prior arrangement" between Fleming and appellant (165,166), and in support of its theory, the Government argued that the evidence shows that this prior arrangement was made by Fleming since he is the one who had the slips of paper with the name "Al" and a telephone number.

The trial court apparantly accepted the Government's "some sort of prior arrangement" theory because it only questioned the Government attorney on how appellant was tied into the slips of paper Fleming had in his pocket. The Government responded that the slips had appellant's first name, Al, and an agent had testified, "that they called up and the telephone number came back, Apartment 4C, 125 W. 96th Street, and there are three of them"[referring to the slips] (166). Apartment 4C, was tied into appellant because he was there on October 12th and October 15th, and because appellant told the agents, "This isn't my apartment. I'm only using it."

The Government further argued that appellant gave Tezzano the cocaine while they were in the bathroom. To support this argument the Government's attorney theorized (1) that it had to be appellant because Brown and Fleming were in the living room, (2) that when Tezzano came out of the bathroom she gave Brown $300 and before that she was "desperate for money" and (3) that after leaving the apartment Tezzano and Brown went back to the bar on West 96th Street and Tezzano telephoned Mangino to tell him, "I got the stuff, come on over." (167,168).

According to the Government, "This indicates inferentially, at least, that she had just gotten it" and according to the Government if you traced Tezzano's path that night, there was no other person from whom she could have gotten it other than appellant, "because definitely she did not get it from Fleming.

There was no other opportunity for anybody else to give her that package except Mr. Leamous inside that bathroom."(168).

The trial court apparantly could not fully accept the Government's argument that only appellant could have sold the cocaine to Tezzano that night because the trial court asked the Government to explain how it could conclude that from the fact that Tezzano came out of the bathroom with $300 that she was the buyer and not the seller.

The Government's response was a treat in mental gymnastics. It argued that Tezzano did not come out of the bathroom with only $300, she came out with $1,000. The $1,000 is traced as follows: She gave $300 to Brown, $600 was on her person when she was arrested later that night and Fleming had $100 when he was arrested. Therefore, appellant must have received $2,300 for making the sale. In support of this theory the Government stated

> "We have the lactose, the lactose in his apartment, I think there is a sufficient nexus, and we take the lab report, which is in evidence, shows, as do the chemical analysis papers, that lactose was the dilutent which was used in the cocaine which was bought by Mangino." (169)

Appellant's trial counsel in effectively argued that the Government had not proved its case against appellant and pointed out that (1) the recordings do not mention appellant; (2) Brown was in the apartment with appellant for 15 minutes and no conversation was testified to connecting appellant with a conspiracy, and (3) that,"there isn't a scintilla evidence-----".

To which the Court responded:

> "Oh, yes, there is.
>
> "I will deny your motion. I think prima facie the Government satisfies its burden of proof, at least of showing me that there are facts from which reasonable men could find beyond a reasonable doubt that Leamous did pass the narcotics to the girl while they were in the bathroom. I think there is evidence from which a jury could find that" (170).

Evidence and the legitimate inferences to be drawn therefrom must be viewed in the light most favorable to the Government, but before an inference can be drawn there must be evidence from which to draw the inference. It is in this respect that the Government's case against appellant must fail.

The Government's evidence at best only proved a conspiracy between Tezzano, Brown and Fleming, the object of which was to sell cocaine to Agent Mangino.

There is no evidence other than mere speculation, supposition, hypothesis, conjecture or impermissible inferences drawn from inferences to prove that appellant knowingly participated in a conspiracy or to establish the nature of his participation. Because of the complete lack of direct evidence in the case against appellant of some illegal or illicit activity, it was not sufficient to allow the jury to make the necessary determination as to the role played by Alfred Leamous in this conspiracy.

The evidence with respect to appellant was therefore insufficient as a matter of law. The trial court erred in denying his motion for acquittal. The indictment against him should be dismissed. United States v. Stromberg, (supra); United States v. Aviles, 274 F. 2d 179 (2d Cir.), Cert. denied, 362 U.S. 974 (1960).

POINT 11

THE JURY DEMONSTRATED ITS CONFUSION OF THE GOVERNMENT'S EVIDENCE TO ESTABLISH THE NATURE OF APPELLANT'S PARTICIPATION IN THE CONSPIRACY BY ACQUITTING APPELLANT OF THE SUBSTANTIVE CRIME AND CONVICTING HIM ON THE CONSPIRACY

The Government's theory of appellant's participation in the conspiracy was premised upon the sole proposition that Fleming brought Tezzano and appellant together so that appellant could provide the cocaine that Agent Mangino purchased that night. Unless the jury believed this theory appellant could not be convicted of either the conspiracy count or the indictment or of the substantive count.

During the second day of deliberation the jury sent a note to the trial court requesting (1) a clarification of the conspiracy count; (2) a clarification of the possession count; and (3) whether either defendant could be convicted of conspiracy and not of possession.

The trial court re-instructed the jury as to the elements of a conspiracy and as to the second item of the note regarding the elements of the substantive count the court advised the jury:

> "Now, here the Government says that Leamous made a sale while they [Tezzano and Leamous] were in the bathroom there, and the Government asks you to infer that from circumstantial evidence. That is the distribution the Government relies on, and that is the possession the Government relies on."

In answer to the third question the jury was instructed that on the evidence in this case it must acquit or convict the defendants on both counts otherwise the verdict would be inconsistant on their part.

It is unfortunate that the trial court used the word "inconsistant" because as a matter of law a jury may render inconsistant verdicts. A more appropriate word might have been repugnant because the jury had to find that appellant made a sale to Tezzano while they were in the bathroom to convict appellant of conspiracy which was all that had to be proven to convict on the substantive count. Since the jury acquitted appellant of the substantive count. They also had to acquit him of the conspiracy as a matter of law. It is impossible for a jury to determine the same factual situation in this indictment differently to reach two different verdicts. That is repugnant and void.

This Appellate Court should note that it might have been possible to convict appellant of the substantive count and acquit on the conspiracy count, and that verdict would not be repugnant or even inconsistant. The jury might possibly

have believed that appellant sold the cocaine to Tezzano but did not join the conspiracy. The jury could not, however, find that appellant joined the conspiracy without selling the cocaine to Tezzano. Appellant's only role in the conspiracy was the purported sale of cocaine in the bathroom to Tezzano.

POINT 111

THE GOVERNMENT USED IMPROPER METHODS TO OBTAIN A CONVICTION

The interests of the Government in a criminal prosecution is not that it shall win a case, but that justice shall be done. The Government was unfair in its prosecution of appellant and it is very clear from the "repugnant" jury verdict (Point 11, supra) that the Government's attorney was being personally rewarded by the jury by appellant's conviction rather than on the evidence adduced from the witness stand.

The Government's attorney set the stage in his opening statement to the jury as to how the Government would prove appellant's guilt. In the only two references to appellant in the opening statement the Government made promises of evidence it knowingly could not substantiate and which were patently false. Thus the jury was promised that the Government's testimony would show (1) That Brown and Fleming agreed that they would acquire the cocaine from appellant (10) and (2) That Brown would testify that appellant gave cocaine to Tezzano for $3,300 (11).

To compound the substantial prejudice to appellant by these knowingly false promises of what the Government's testimony would show the prosecutor nailed up appellant's coffin by telling the jury that,

> "With this opening statement the Government makes a commitment that it will substantiate the charges contained in the indictments so that by the termination of this case you the jury will find both defendants guilty beyond a reasonable doubt." (11, 12)

The Government's attorney was unable to fulfill his promises of direct testimony showing appellant's participation in the conspiracy, ie. Fleming and Brown agreed that appellant would supply the cocaine, and Brown did not testify that appellant gave cocaine to Tezzano for $3,300. Nevertheless, the lack of direct evidence against appellant did not persuade the Government into taking a more conservative course in summation. If anything the Government's attorney appeared to gain confidence in the lack of testimony as if that fact was proof that the Government's theory of appellant's guilt was bolstered by this inconsequential event - When the factual situation did not quite fit the pattern of secrecy normally occasioned in a drug conspiracy the Government conveniently closed a door, (253, 127) and when it was necessary to speed up an event to describe to the jury in artful terms that the conspiracy had reached its fruitful conclusion that was done as well (253,218).

Also, and most incredibly was the manner in which Tezzano's affluence was described to the jury to fit the Government's case. At page 249 the Government argued that Tezzano was broke, dead broke and she needed money (Mangino had already given her the $3,300). The only way she can get money is by supplying him with the drugs. At page 250 the Government told the jury that it was very important that they remember that when Tezzano came out of Fleming's office she said to Brown, "let's go eat". Brown then said he didn't have any money, to which Tezzano replied, "Well, I've got a lot of money. Let's go out." According to the Government this was when the contract was made and Fleming agreed to supply her with the drugs. At page 253, when Tezzano came out of the bathroom at appellant's apartment and gave Brown the $300. the Government argues that this is proof that she got the cocaine from appellant.

What was most damaging to appellant was the Government's unchallenged arguments to the jury that certain evidence was circumstantial evidence when it was no evidence at all, and the Government was allowed to draw inferences therefrom, and, on many occasions inferences were drawn from inferences without objection. So that when the prosecutor was done with his summation the simple factual statements of the witnesses which in no way implicated appellant in any crime whatsoever, coupled with the innocuous physical evidence consisting of Fleming having slips of paper with the name "Al" and a telephone number and the 2 one pound cans of lactose, to the jury became evidence of appellant's guilt.

In Berger v. United States, 295 U.S. 78 (1935), the Supreme Court stated,

> "Though the prosecutor may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. It is fair to say that the average jury ---has confidence that these obligations will be faithfully observed. Consequently improper suggestions, insuations, and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

POINT 1V

ALTHOUGH NO EXCEPTION TO THE TRIAL COURT'S CHARGE WAS MADE THIS APPELLATE COURT SHOULD DETERMINE WHETHER THE DEFINITION OF REASONABLE DOUBT WAS PLAIN ERROR

Appellant's trial counsel did not present a request to charge on "reasonable doubt" and he did not except or comment upon the charge given by the trial court. Nevertheless, this Appellate Court is urged to review the charge given.

Briefly, in determining what constitutes reasonable doubt it would seem improper for the jury to be told that they should introspect into their own minds to determine what they would do or not do in a certain situation. If that is the case this legal proposition would be uncertain. Reasonable doubt must be based upon what the ordinary man would do in a particular situation.

Also, the reasonable doubt charge given to this jury was put in terms of what produces a solemn belief or conviction in your own mind and what does not so constitute a solemn belief. Being phrased in this manner the evidence that is required to substantiate both the proof beyond a reasonable doubt and the failure of the proof beyond a reasonable doubt is the same.

Lastly, unless the charge contains a definition of the presumption of innocence which advises the jury that this presumption is a fact, and, as important as any other fact in the case, and that the law presumes this fact of innocence

until it is overcome by evidence of a defendant's guilt beyond a reasonable doubt, the charge necessarily is weakened.

CONCLUSION

APPELLANT'S CONVICTION SHOULD BE REVERSED, AND IN VIEW OF THE INSUFFICIENCY OF EVIDENCE, THE INDICTMENT DISMISSED.

Respectfully submitted,

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